Supreme Court, U.S.
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93-928

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ATTORNEY GENERAL OF TEXAS, *etc., et al.*,

Petitioners,

v.

JUDGE F. HAROLD ENTZ, *etc., et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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November 24, 1993

QUESTION PRESENTED

Whether the Court should exercise its supervisory power to correct the Fifth Circuit's error in refusing to grant a joint motion by the plaintiffs and the state to remand the case to the district court for consideration and effectuation of a settlement approved by the Governor, the Attorney General, the Secretary of State, the Lieutenant Governor, the Speaker of the House, and a majority of both houses of the Texas Legislature, but opposed by one of fifteen official-capacity state defendants and two personal-capacity defendant-intervenors?

PARTIES TO THE PROCEEDING

The participating parties in the proceeding below were:

League of United Latin American Citizens ("LULAC") Local Council No. 4434, LULAC Local Council No. 4451, LULAC (Statewide), Christina Moreno, Aquilla Watson, Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Judge Maryellen Hicks in her personal capacity, and Reverend James Thomas, *Plaintiffs*;

Houston Lawyers' Association, Weldon Berry, Alice Bonner, Reverend William Lawson, Bennie McGinty, Deloyd Parker, and Francis Williams, *Plaintiff-Intervenors*;

Jesse Oliver, Fred Tinsley, and Joan Winn White, *Plaintiff-Intervenors*;

In their official capacities only, Dan Morales, Attorney General of Texas; John Hannah, Secretary of State of Texas; and the current members of the Judicial Districts Board of Texas (Thomas R. Phillips, Michael J. McCormick, Pat McDowell, Thomas J. Stovall, Jr., B. B. Schraub, Olin B. Strauss, Darrell Hester, William E. Moody, Weldon Kirk, Clyde R. Ashworth, Ray D. Anderson, Joe Spurlock, II, and David A. Talbot, Jr.), *Defendants*; and

In their personal capacities only, Judge F. Harold Entz and Judge Sharolyn Wood, *Defendant-Intervenors*.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

This filing is a cross-petition to the petition for writ of certiorari pending before the Court in *League of United Latin American Citizens Council No. 4434 v. Attorney General of Texas*, No. 93-630 ("*LULAC* petition"). The Attorney General of Texas cross-petitions on behalf of fifteen state officials who were joined in this case only in their official capacities. Hereinafter, both for simplicity and because of the rifts explained in the following paragraph, the state petitioners collectively will be termed the "state."

Served 10-26-93.

The fifteen official-capacity state petitioners are: (i) the Attorney General; (ii) the Secretary of State of Texas; and (iii) the thirteen-member Judicial Districts Board of Texas, chaired by the Chief Justice of the Supreme Court of Texas. These state officials have varying opinions on

the proper disposition of this case, and one of them -- the Chief Justice -- retained private counsel to represent his views on settlement to the Fifth Circuit sitting en banc. Inasmuch as the Attorney General perceives his state constitutional duties to require presentation of a unified position for the state under these circumstances, he files this cross-petition on behalf of the state in his capacity as the state's chief legal officer.

The respondents are Judge Entz of Dallas County, Texas, and Judge Wood of Harris County, Texas, both of whom intervened as defendants in this suit only in their personal capacities. Hereinafter, unless the context requires more specificity, they together will be termed the "incumbent judges." Because of the Attorney General's position that, as the state's chief legal officer, he must present a unified state position for all the official-capacity state parties in the suit, the state's Chief Justice as chair of the Judicial Districts Board is not denominated a respondent, although he was permitted to express opposition to the settlement through retained private counsel before the Fifth Circuit sitting en banc in the second round of appeals in this case.

OPINIONS BELOW

The opinions below are reproduced in the appendices to the *LULAC* petition and the state's Memorandum in Response to Petition for Writ of Certiorari, which is being filed simultaneously with this cross-petition (and which will be termed the "state's Memorandum Response").

STATEMENT OF THE CASE

The Statement of the Case at pages 2-6 of the state's Memorandum Response fully canvasses the case for purposes of this cross-petition and will not be replicated here.

REASONS FOR GRANTING THE WRIT

By the time the Fifth Circuit heard oral argument en banc in the current phase of this case, a substantial part of the state's trial judiciary had been under sustained voting rights attack for five years. A trial court had found that the challenged electoral system violated the antidiscrimination principle of section 2 of the Voting Rights Act in all nine targeted counties.

Following the district court's liability ruling, affected minority voters momentarily gained hope when the state and the successful plaintiffs reached agreement on an interim election plan. That agreement was aborted, however, when the district court altered a critical provision.

Then, even in the face of the findings that large segments of the state's citizens were subject to illegal discrimination, and the social and political repercussions of such findings, the state continued to defend its judicial election system through first a panel and then the full contingent of the Fifth Circuit. The state still continued its defense before this Court, but ultimately was rebuffed on the basic question of section 2 coverage in *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376 (1991) ("*HLA*"). The state's trial judiciary returned to the limbo it had been in since the suit was filed.

Even on remand after *HLA*, the state continued its dogged defense. After successfully resisting remand of the case to the district court, the state argued to a panel of the Fifth Circuit that the facts of its system satisfied the standards of section 2. More than a year passed after the argument, with the state, the affected minorities, and the anxious trial judiciary awaiting a decision on the legality of

its system and the difficult racial issues raised in the case. Negotiations resumed. The long wait ended with a panel decision finding illegality in all except one of the nine counties.

Shortly after this ruling, the state intensified its negotiations with the plaintiffs and reached an agreement with them. The agreement would not necessarily conclude the litigation, because it was subject to a fairness hearing before the district court; however, it pointed toward a conclusion to the long and difficult ordeal for the state judiciary. The state leadership approved the accord. It was signed by the Governor, the Lieutenant Governor, the Speaker of the House, the Attorney General, and the Secretary of State. It was approved by a majority vote of the membership of both houses of the Texas Legislature.

Then, the same state whose history of mistreatment of minorities was so shameful that it was subjected to the inverted federalism of preclearance under section 5 of the Voting Rights Act turned to the federal courts to settle this divisive racial issue amicably. The agreement was presented to the en banc Fifth Circuit, which was asked to abate further consideration of the merits and return the case to the district court where all those concerned with one aspect or another of the proposal could be heard in an evidentiary setting.[1] The Fifth Circuit only a short time before had approved precisely such an approach in the settlement of a Louisiana voting rights challenge to a judicial selection system. *See Chisom v. Edwards*, 970 F.2d 1408 (5th Cir. 1992).

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[1] The proposed settlement would have to go through the section 5 preclearance process before adoption by the district court. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981).

This time, though, the Fifth Circuit insisted on reaching the merits and refused to return the settlement to the district court for a hearing. The reasons the court offered for refusing to permit a hearing were that the two incumbent judges from Dallas and Harris Counties (whose districts would be unaffected) opposed it, the Chief Justice opposed it, and, anyway, as was set forth in the remainder of the opinion, the system was legal so there was no basis for settling.

In making this ruling, the Fifth Circuit contradicted this Court's expressed preference for settlements, conferred standing and obstructionist authority on two personal-capacity intervenors far broader than the law warrants, and ignored binding state and federal law which makes the state the real party in interest here and its Attorney General the spokesperson for the state in court.

Federal courts have long been directed to operate in a way that encourages settlements. This Court has rejected propositions of law for the policy reason that doing so "could serve as a disincentive to negotiation of settlements in institutional reform litigation." *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 763 (1992). The underlying premise of the rule of law adopted in *Evans v. Jeff D.*, 475 U.S. 717 (1986) (holding it permissible in civil rights cases to bargain over merits and fee issues simultaneously), is that settlements are a preferred alternative to litigation. In fact, civil rights actions are to be treated no differently than other civil actions in terms of settlement. *Id.* at 732 (citing *Marek v. Chesny*, 473 U.S. 1 (1985)).

This preference for settlement is so strong that federal courts are permitted to place their imprimatur on consent decrees that go beyond constitutional minimums, *Rufo*, 112 S.Ct. at 762-63, and, in a matter even more pertinent here, that operate through the Supremacy

Clause of the Constitution to override contrary state law. *See Maryland v. United States*, 460 U.S. 1001 (1983) (summary affirmance rejecting, as explained in a dissent by then-Justice Rehnquist, states' claim that federal consent decree could not be adopted if it would override state laws).[2]

Principles governing remedies in voting rights cases indicate that settlements are preferred over court resolution to perhaps an even greater degree in that arena than others. Governments under voting rights attack are encouraged by the case law to solve their problems themselves. In the leading case on remedy once voting rights liability has been determined, *Wise v. Lipscomb*, 437 U.S. 535 (1978), both the plurality opinion of Justice White and the concurrence of Justice Powell emphasized the importance of offering state legislative bodies the opportunity to adopt voting rights remedies reflecting the policy choices of elected officials. 437 U.S. at 540; *id.* at 548 (preferring such choice to "directive" from federal court).

Consideration by this Court of the Fifth Circuit's discouragement -- indeed, obstruction -- of settlement in a voting rights setting is important to states and other governing bodies. When their at-large electoral systems are challenged, they are faced with a fact-intensive judicial investigation grounded in, as Chief Justice Rehnquist phrased it, a "highly amorphous theory," *Wise v. Lipscomb*, 437 U.S. at 550 (concurrence). The Fifth Circuit effectively forces the states to remain on the legal field of battle regardless of time, cost, and (perhaps most

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[2] This case also stands as authority rejecting the argument made by the two incumbent judges that the state cannot even obtain a hearing on a proposed consent decree whose effect would override a state constitutional provision.

significantly in the context of governing a pluralistic citizenry) divisiveness.

Of particular importance here is the fact that the Fifth Circuit's compelled litigation approach conflicts with one of the animating purposes of the 1982 amendments to the Voting Rights Act. The Court has observed that one of the principles underlying congressional adoption of the results test in section 2 was to lessen the chance for this kind of case to engender bitterness in the community. *See Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) ("unnecessarily divisive").

It is important, not to mention consistent with federalism principles and amended section 2, for this Court to give the states more breathing room. Less constrictive alternatives should be made available to the states than the Fifth Circuit's adoption of a principle of compelled peristalsis of a bitterly fought, racially-charged case through the entire length of the federal judicial process.

The two incumbent judges, both white and both claiming that the settlement was a partisan effort against the side on which they were partisan, were permitted to foreclose even a hearing on a proposed solution which affected them not at all as incumbent judges, not at all in the seven counties where they cannot vote for state district judges, and only minimally (as one of hundreds of thousands) as voters in the two counties in which they may vote for state district judges.

The proposed settlement, which would preserve the two incumbent judges' seats in their current form as countywide judicial districts, simply did not affect them in their personal capacities as district judges. Thus, if they are to have standing to attack it, the source of their standing must come from elsewhere.

As voters, the two incumbent judges might have some arguable basis for standing insofar as their two counties are concerned; yet, under *Baker v. Carr*, 369 U.S. 186 (1962), their standing as voters certainly stretches no further than those two county lines. 369 U.S. at 204-08 (delineating voting rights standing principles). Beyond those lines, their rights as voters in elections for state district judges are unaffected, and they have no standing to impede settlement efforts.

The Fifth Circuit gave the incumbent judges the far-reaching power to prevent even a hearing on a proposed settlement in the face of this Court's clear admonition:

> It has never been supposed that one party ... could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitle to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have the power to block the decree merely by withholding its consent.

Local Number 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 528-29 (1986).

Thus, even if the two incumbent judges have standing as voters in their two counties, governing law does not permit them to stop a remand for hearing on settlement. Once again, it is important for this Court to afford states and other governing bodies an opportunity to at least obtain a hearing on the settlement of such contentious suits. The Fifth Circuit's approach effectively forecloses such a possibility because there is always bound to be at least *one* affected voter disagreeing with a voting rights settlement, which is by nature a *group* settlement. *Cf.*

Shaw v. Reno, 113 S.Ct. 2816, 2846 (1993) (J. Souter, dissenting).

The third reason for the Fifth Circuit's rebuff of settlement efforts was that the state's Chief Justice, as chair of the Judicial Districts Board, objected. This rationale is as erroneous, and raises issues as important to the settlement rules for voting rights cases, as the two reasons discussed above.

The Chief Justice is only one among fifteen official-capacity defendants who have been in this suit for over the last five years. As explained at the outset of this cross-petition, these fifteen officials are not of one mind about the settlement of this case. Undoubtedly, they are not of one mind about any one of the many issues raised by this lawsuit. There is no realistic basis for assuming otherwise.

Yet, this absence of unanimity cannot be an impediment to efforts to obtain at least a hearing on settlement. Otherwise, there would be yet another factor which effectively makes settlement of voting rights suits an impossibility.

Preexisting legal doctrines announced by this Court, but completely ignored by the Fifth Circuit, prevent this legal impasse from being the law. In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court directed that "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." 473 U.S. at 166. "[T]he real party in interest is the entity." *Id.* This crucial point has been emphasized time and again by the Court. *See, e.g., Karcher v. May*, 108 S.Ct. 388, 393 (1987) (explaining fundamental difference between personal and official capacity parties and observing that "[w]e have repeatedly recognized that the real party in

interest in an official-capacity suit is the entity represented and not the individual officeholder").

When, as here, the state is the real party in interest, state law is determinative of who may speak for the state in federal court. *New York v. Uplinger*, 467 U.S. 246, 247-48 n.1 (1984). Notwithstanding the Fifth Circuit's authorization of privately retained counsel for the Chief Justice, Texas law is clear that the Attorney General speaks for the state in these settings.

The Texas Constitution designates the Attorney General as the state's chief legal officer. TEX. CONST. art. IV, § 22, interp. commentary (Vernon 1984). As such, he is the sole state official authorized by law to speak for the collective interests of the state in civil litigation and is cloaked with "broad judgment and discretion," remaining free to exercise his discretionary authority in an independent manner "which will not be controlled by other authorities." *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924). This broad authority extends to the control of litigation involving other statewide constitutional officers. *See Scott v. Exxon Corp.*, 763 S.W.2d 764, 767 (Tex. 1988) (error for court to rely on stipulation signed by Land Commissioner, because it was not approved by the Attorney General). This broad authority recently has been recognized by seven justices of the Supreme Court of Texas who agreed that the Attorney General is "constitutionally empowered to execute a settlement agreement" in litigation challenging a legislative redistricting plan. *Terrazas v. Ramirez*, 829 S.W.2d 712, 747 (Tex. 1991) (summary by dissent).

Thus, none of the reasons proffered by the Fifth Circuit for refusing even a hearing on settlement, thereby insisting on reaching the merits of this complex, multi-county case, survives analysis. The laboriousness of refuting the multifarious rationale of the lower court

should not be permitted to obscure a quite basic point. A federal appellate court has established a rule whose practical effect is to compel states and other governments to *never* reach an accommodation with plaintiffs in voting rights litigation, no matter what the facts and no matter how critical and divisive the issue at stake. The adoption of this principle gains even more significance from the fact that it was done by the Fifth Circuit, long one of the prime fonts of voting rights law.

It is a pernicious result, bound to always leave festering the very divisiveness which Congress sought to avoid in enacting the 1982 amendments to the Voting Rights Act. The deleterious effect on voting rights jurisprudence of effectively removing the settlement option cries out for action by the Court. The states need to know the rules in these cases, and a decision by this Court in this case would give them much needed guidance.

CONCLUSION

This cross-petition for writ of certiorari should be granted.

Respectfully submitted,

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Petitioners,

v.

JUDGE F. HAROLD ENTZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS LEAGUE OF LATIN AMERICAN CITIZENS, COUNCIL NO. 4434, et al.

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JUDGE F. HAROLD ENTZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS LEAGUE OF LATIN AMERICAN CITIZENS, COUNCIL NO. 4434, et al.

Respondents League of Latin American Citizens, Council No. 4434, *et al.*, the petitioners in No. 93-630, *League of Latin American Citizens, Council No. 4434, et al. v. Attorney General of the State of Texas, et al.*, support the grant of certiorari in the present case. The question presented is the same as Question 3 presented in No. 93-630. For the reasons set out in their Reply to Briefs in Opposition and Supplemental Brief in Support of the Petition for a Writ of Certiorari filed in No. 93-630, the Court should grant certiorari in both cases and should grant certiorari on all of the questions presented in No. 630.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari of the Attorney General of Texas, *et al.*, should be granted, along with the petition for a writ of certiorari in No. 93-630.

Respectfully submitted,

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OCTOBER TERM, 1993

ATTORNEY GENERAL OF TEXAS, *et al.*,
PETITIONERS,

v.

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RESPONDENTS.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGE ENTZ'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Court of Appeals properly refused to permit some of the parties, by their agreement, to block consideration of the merits of the appeals independently perfected by Judge Entz and Judge Wood?

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No. 93-813

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

ATTORNEY GENERAL OF TEXAS,

PETITIONER,

v.

JUDGE F. HAROLD ENTZ, *et al.*,

RESPONDENTS.

JUDGE ENTZ'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Dallas County District Judge F. Harold Entz ("Judge Entz") opposes Petitioner Texas Attorney General Dan Morales' Cross-Petition for Writ of Certiorari for the following reasons:

STATEMENT OF THE CASE

Judge Entz adopts the factual background provided in his opposition to petition for writ of certiorari in the related Cause No. 93-630, "*League of United Latin American Citizens, et al., v. Attorney General of Texas, et al.*" Judge Entz relies upon the opinion of the en banc majority of the Fifth Circuit for the balance of the factual background.

REASONS FOR DENYING THE WRIT

Judge Entz is relieved to find himself finally in this proceeding opposite the "versus" from the Attorney General of Texas. The Attorney General ("General Morales") has cross-petitioned for certiorari on the same ground raised by question 3 of petitioners in Cause No. 93-630, i.e., the propriety of the Fifth Circuit's refusal to dismiss Judge Entz's and Judge Wood's appeals on the joint motion to remand of petitioners and General Morales. Accordingly, Judge Entz adopts his opposition to that petition on that issue for this response. General Morales has raised a few additional arguments in his cross-petition to which Judge Entz must briefly reply here.

General Morales argues to this Court that the Fifth Circuit should have let him surrender rather than reach the merits and let him "win." The quotation marks are justified because, as evidenced by his cross-petition, General Morales does not consider the result below to be a win and does not want to win this lawsuit for the State of Texas; he wants to reach a political result consistent with his partisan affiliation. General Morales surely does not believe that the procedural issue regarding the motion to remand merits this Court's plenary consideration; it is just an avenue to reach the political result that he desires. Thus General Morales tries to persuade this Court that the anomalous procedural issue that arose below is a threat to the polity that this Court should address; in so doing he sets up several straw persons that Judge Entz must now knock down.

I. THE DENIAL OF REMAND DOES NOT FORCE THE STATE TO LITIGATE

General Morales tells this Court that the result below will mean that no Voting Rights Act case will ever be settled and that state defendants will be required to litigate to the final motion for rehearing, because any disgruntled voter can force the state defendants to continue fighting. That admittedly troubling specter evanesces for two reasons.

First, no one is forcing General Morales to fight. Judge Entz does not try to force General Morales to defend this case. Indeed, Judge Entz wishes that General Morales had stepped to the sidelines and taken a seat on the opposing team's bench long ago, rather than obstructing the field of play. Nor does the Fifth Circuit's ruling require General Morales to do anything; that is vividly illustrated by his "Response" to petitioners in No. 93-630, in which he simply took no position on the merits. This is the true point on which General Morales could have cited to *Local No. 93, International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528-29 (1986) ("It has never been supposed that one party . . . could preclude other parties from settling their own disputes and thereby withdrawing from litigation.").

While Judge Entz does not claim the right to force General Morales to litigate, Judge Entz does claim the converse right that General Morales cannot by his agreement prevent Judge Entz from prosecuting his independently perfected appeal. As this Court stated in *Local 93*: "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third

party . . . . A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Id.* at 529.

The reason the Union could not prevent the settlement in *Local 93* is that the settlement did not affect the rights of the Union: "The decree imposed no legal duties or obligations on Local 93." *Id.* at 511. Rather than taking potential promotion slots away from Local 93 members, the settlement created additional promotion slots available to minority plaintiff class members; it did not divide the pie differently, instead it created a bigger pie. *Id.* at 508-10. Thus, approving the consent decree did not affect the rights of the Union and "the District Court's retention of jurisdiction leaves it open for [the Union] to press whatever other claims it might have before that court." *Id.* at 513 n.5. The Union and the plaintiffs in *Local 93* were not adverse because the plaintiffs were not trying to take anything away from the Union and the Union likewise "failed to assert any legal claims" against the plaintiffs. *Id.* at 511.

The situation here is just the opposite; plaintiffs are trying to take away the electoral system in which Judge Entz participates, both as a judge and as a voter; likewise, Judge Entz is defending that system against plaintiffs' attacks. In that context, the lesson of *Local 93* is that Judge Entz cannot require General Morales to continue his appeal, but General Morales cannot by his agreement dismiss Judge Entz's appeal.

Second, General Morales' "endless litigation" specter fails because it does not distinguish between voters and intervenors. Judge Entz does not claim that any disgruntled voter could block General Morales from surrendering; rather, he claims that an intervening party defendant is entitled to continue an independently perfected appeal. The distinction between a voter and an intervenor is significant. A putative intervenor may not intervene of right if his or her interest is already adequately represented and may not intervene permissively if it would disrupt the litigation. *E.g.*, 7C CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §§ 1909, 1913, 1922 (1986). Thus, the problems General Morales conjures are easily managed at the front end when intervention is sought, rather than by overruling *Local 93* and permitting one party to dismiss another party's appeal. *Cf. Matter of First Colonial Corp.*, 544 F.2d 1291, 1298 (5th Cir. 1977) (order granting intervention can limit right of appeal).

General Morales did not oppose or seek to limit Judge Entz's personal capacity intervention at the time and apparently regrets that lapse. General Morales now essentially tries to strike Judge Entz's intervention; that effort is both too late and in the wrong court. With unintended irony, General Morales observes that "civil rights actions are to be treated no differently than other civil actions in terms of settlement." Cross-Petition at 5. While acknowledging that principle, General Morales wishes this Court to honor it in the breach and permit General Morales and plaintiffs to arrogate to themselves the power to undo Judge Entz's intervention and dismiss

his appeal. In any other civil action, such a procedural gambit would be rejected out of hand.

II. JUDGE ENTZ HAD STANDING

General Morales claims that the Fifth Circuit's decision to permit Judge Entz to continue his appeal was wrong because Judge Entz had no standing to object to the proposed "settlement." That argument is flawed in at least two respects.

First, General Morales claims that because the proposed settlement would leave Judge Entz running for election county wide, he has no standing to object to the remand. That puts the cart before the horse. Judge Entz's standing to appeal is not determined by a hypothetical remedy that might be imposed on remand, but rather by the complaint asserted by plaintiffs and the order entered by the trial court. Plaintiffs certainly complained that Judge Entz's election was illegal and sought relief that would affect Judge Entz's bench; the district court found that Judge Entz's election was illegal and ordered an interim remedy that would have affected Judge Entz's bench. Given that, Judge Entz as an intervenor defendant had standing to appeal from that order, he did so, and he has prosecuted that appeal to the Fifth Circuit, the Supreme Court, the Fifth Circuit again, and now again before this Court. Judge Entz's standing to appeal is determined by whether the order from which the appeal is taken adversely affects Judge Entz — and it undisputedly did — not by whether a potential remedy would leave him running county wide.

General Morales wrongly conflates the issues pertinent to the remedial phase of voting rights litigation with those pertinent to the liability phase. Cross-Petition at 6. Admittedly, once there is a final determination of liability, the local government has the right in the first instance to propose a remedy. *Wise v. Lipscomb*, 437 U.S. 535 (1978). Nothing in that opinion or in the underlying policy suggests that an intervening defendant does not have standing to contest a finding of liability because the remedy a local government would propose — if liability were ultimately sustained — would leave the intervening defendant's job intact.

Second, as the Fifth Circuit noted, "the proponents of remand view the judges' intervention too narrowly . . . ." App. 20a. Judge Entz did not limit his motion to intervene to his interest in running county wide in Dallas County; rather, he moved in his personal capacity to intervene generally as a defendant due to his interest as a sitting judge, as a lawyer and participant in the judicial system, and as a voter. Without limiting the scope geographically or occupationally, the district court granted the motion.[1] It blinks reality to say that all of those

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[1] Although Judge Entz directed his factual arguments primarily towards Dallas County, his legal arguments were never so restricted. After General Morales purported to "settle" the appeal, Judge Entz argued to the Fifth Circuit that the scope of his original intervention was sufficiently broad that he could defend all counties under attack. In the alternative, he moved to broaden the scope of his intervention to include the defense of the other counties. The Fifth Circuit determined that the intervention originally was broad enough to cover all counties under

interests are left unaffected if the trial level judiciary of the State of Texas is demolished and rebuilt with an isolated bench or two left untouched. If nothing else, Judge Entz certainly has an interest as a voter in voting for the judges for Dallas County.

General Morales again confuses the issue by claiming that while Judge Entz had standing as a voter to object to remand regarding Dallas County, the Fifth Circuit erred in letting Judge Entz and Judge Wood block the remand and so-called settlement for counties other than Dallas and Harris County. But Plaintiffs and General Morales never asked for a remand for the seven undefended counties alone. Had plaintiffs not sued regarding Dallas County, Judge Entz's ability to intervene might have been altered; had the district court not found liability and entered a remedial order for Dallas County, Judge Entz's ability to appeal might have been altered; and had General Morales and plaintiffs reached an agreement that did not affect Dallas County and moved to remand only with respect to other counties while permitting Judge Entz's appeal on Dallas County to go forward, Judge Entz's ability to oppose the motion to remand might have been altered. None of those things happened, however. At every stage of this proceeding — from the complaint, to the district court's order, to the purported settlement and motion to remand — Dallas County and Judge Entz have been under attack. Judge Entz has a right to oppose the motion to remand and defend himself and his interests

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attack and thus did not need to address the motion to broaden Judge Entz's intervention. App. 21a n.14.

from that attack. General Morales cannot take away that right by reciting a litany of "could haves" that never happened.[2]

CONCLUSION

Judge Entz respectfully requests this Court to deny General Morales' cross-petition for writ of certiorari.

Respectfully submitted,

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*Counsel of Record

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[2] Judge Entz does not concede that General Morales could have settled the appeal with respect to the other counties over Judge Entz's objection, *see supra* note 1, but only notes now that General Morales never attempted that.

93-928

~~No. 93-813~~

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1993

ATTORNEY GENERAL OF TEXAS, ETC., ET AL.,

Petitioners,

v.

JUDGE F. HAROLD ENTZ, ETC., ET AL.,

Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JUDGE WOOD'S BRIEF IN OPPOSITION TO CROSS-PETITION OF TEXAS ATTORNEY GENERAL

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QUESTION PRESENTED

1. Whether this Court should grant certiorari to reaffirm prior decisions holding that state officials lack the power to require the federal courts to enter "consent decrees" that restructure state government by "settlement agreement" between the state attorney general and private parties in violation of the constitutional and statutory rights of non-parties and objecting parties.

LIST OF PARTIES

The participants in the proceedings below were:

Plaintiffs:

LULAC Local Council 4434
LULAC Local Council 4451
LULAC (Statewide)
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Willard Pen Conat
Gene Collins
Al Price
Theodore M. Hogrobrooks
Ernest M. Deckard
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty
Jesse Oliver
Fred Tinsley
Joan Winn White

LIST OF PARTIES – Continued

Defendants:

Dan Morales, Attorney General of Texas
John Hannah, Secretary of State of Texas
Texas Judicial Districts Board
Thomas R. Phillips, Chief Justice, Texas Supreme Court
Mike J. McCormick, Presiding Judge, Court of Criminal Appeals
Pat McDowell, Presiding Judge, 1st Administrative Judicial Region
Thomas J. Stovall, Jr., Presiding Judge, 2nd Administrative Judicial Region
B. B. Schraub, Presiding Judge, 3rd Administrative Judicial Region
Olin Strauss, Presiding Judge, 4th Administrative Judicial Region
Darrell Hester, Presiding Judge, 5th Administrative Judicial Region
William E. Moody, Presiding Judge, 6th Administrative Judicial Region
Weldon Kirk, Presiding Judge, 7th Administrative Judicial Region
Clyde R. Ashworth, Presiding Judge, 8th Administrative Judicial Region
Ray D. Anderson, Presiding Judge, 9th Administrative Judicial Region
Joe Spurlock II, President, Texas Judicial Council
Leonard E. Davis

Defendant-Intervenors:

Judge Sharolyn Wood
Judge Harold Entz

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No. 93-813

In The

Supreme Court of the United States

October Term, 1993

ATTORNEY GENERAL OF TEXAS, ETC., ET AL.,

Petitioners,

v.

JUDGE F. HAROLD ENTZ, ETC., ET AL.,

Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JUDGE WOOD'S BRIEF IN OPPOSITION TO CROSS-PETITION OF TEXAS ATTORNEY GENERAL

Respondent Harris County District Judge Sharolyn Wood ("Judge Wood") respectfully files this Brief in Opposition to the Cross-Petition for Writ of Certiorari filed by the Texas Attorney General because the *en banc* Fifth Circuit Court of Appeals correctly followed controlling law in deciding this case in favor of the State of Texas and refusing to remand it for implementation of the Texas Attorney General's "settlement" when there was no violation of federal law.

OPINIONS AND JUDGMENT BELOW

Judge Wood incorporates by reference the statement of opinions and judgments below in her Cross-Petition, *Wood v. Attorney General of Texas.*

JURISDICTION

Judge Wood incorporates by reference Petitioners LULAC's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDERS INVOLVED

Judge Wood incorporates by reference the statement of Constitutional Provisions and Statutes Involved in her Cross-Petition, *Wood v. Attorney General of Texas.* Judge Wood adds only that the Texas Attorney General has included in the appendix to his Cross-Petition an order entered by the district court on January 11, 1990 at the request of then Attorney General Jim Mattox. Since the Defendant-Intervenors' interlocutory appeal had already been granted, the district court's order was void for lack of jurisdiction. The Order of the Fifth Circuit Court of Appeals, also entered January 11, 1990, which held that the district court was without jurisdiction, is included as Appendix C ("App. C").

STATEMENT OF THE CASE

This case is now a collusive § 2 Voting Rights Act case in which the Texas Attorney General and a powerful faction within his political party are attempting to use the federal judiciary to enforce their private "settlement agreement" to create law in place of the duly enacted state laws governing judicial elections. The relevant facts are set out in Judge Wood's Cross-Petition, *Wood v. Attorney General of Texas*, and Judge Entz's Brief in Opposition to Petition for Writ of Certiorari and are incorporated herein by reference.

Judge Wood adds only what the Texas Attorney General's statement of facts ignores, namely that the Plaintiffs chose a judicial forum to air their grievances because they could not achieve what they wanted through the regular election process. Their choice of a judicial forum necessarily involved the claim that Texas' state district judge election system was illegal under federal law. When the trial court agreed, there was an immediate "settlement" calling for subdistricting and partisan judicial elections which the trial court undertook to implement immediately without a remedial hearing. The "settlement" foundered solely on the trial court's independent insistence on his own preference for non-partisan judicial elections and the Defendant-Intervenors' interlocutory appeal on the merits based on their insistence that Texas' district judge election system did not violate federal law.[1]

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[1] The trial court's insistence on a non-partisan "remedial plan" indicates that what the court was really trying to say was that when partisan voting creates racial imbalance in elections, the partisan aspect must be eliminated. The proper course

The Texas Attorney General joined the Defendant-Intervenors' interlocutory appeal only after the Fifth Circuit accepted the appeal and stayed the "remedial plan." *See* App. C. Appellate review followed in the Fifth Circuit, which reversed the trial court, and in this Court, which reversed the Fifth Circuit's *en banc* holding that § 2 does not apply to the election of state district judges. Thereafter, when it began to appear on remand that the *en banc* appellate court might hold once more that Texas' district judge election system does not violate federal law, and therefore that the Plaintiffs might not be able to obtain from the courts what they could not obtain from the legislature and the people, the Texas Attorney General and the Plaintiffs held secret talks and agreed to a second "settlement" (again incorporating partisan elections) which they insisted that the Court of Appeals rubber-stamp by remand. That "settlement" would have drastically altered the laws of Texas to the settling parties' own partisan political benefit in disregard of the rights of the State Defendants charged with administering Texas' judicial election system, the Defendant-Intervenors (whom the Texas Attorney General still claims to represent in their official capacity but excluded from the "settlement" discussions), and the millions of Texas voters whose constitutional and statutory protections are violated by this illegal scheme.

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under *Whitcomb v. Chavis*, 403 U.S. 755 (1971), would instead have been for the trial court to refuse to find a violation of federal law – as Judges Wood and Entz maintained – not to impose a non-partisan "remedy" for racial imbalance due to partisan, but not racially discriminatory, voting.

When the Court of Appeals refused, *en banc*, to remand this case for "settlement," and instead decided it in *favor* of his client, the State of Texas, the Texas Attorney General attacked the Court of Appeals' judgment by Cross-Petition, seeking to perpetuate a case the State has won at state expense until he can get his "settlement."

REASONS FOR DENYING THE WRIT

I.

THE TEXAS ATTORNEY GENERAL IMPROPERLY SUPPORTS THE PLAINTIFFS' PETITION FOR CERTIORARI AND SEEKS REMAND OF A CASE DECIDED IN FAVOR OF THE STATE.

As Judge Wood predicted in her Cross-Petition, *Wood v. Attorney General of Texas*, Texas Attorney General Dan Morales has abandoned all pretense of opposing this suit as counsel for the Defendant State of Texas. He has now filed a Cross-Petition seeking a *de facto* reversal of the *en banc* judgment in *favor* of his client by remand of the case to implement a "settlement agreement" he has reached with the Plaintiffs that would change the form of state government.

In their Petition for Writ of Certiorari, the Plaintiffs seek reversal of this case on the merits and remand of their and Attorney General Morales' "settlement" for implementation. In his "Response" – *not* "Opposition" – to the Plaintiffs' Petition, the Texas Attorney General *supports* the Plaintiffs' request for remand for entry of "settlement" while insisting that he and he alone speaks for the *defense*; and he has filed his own Cross-Petition

seeking remand of a case which he, as the State of Texas' counsel, has nominally *won*.

As pointed out in Judge Wood's Brief in Opposition to the Plaintiffs' Petition, the issue whether the Court of Appeals should be required to remand this case for effectuation of "settlement" is moot in light of the Fifth Circuit's *en banc* holding that Texas' district judge election system does not violate § 2. The Court should not grant certiorari on the Fifth Circuit's proper refusal to remand a case for "settlement" where there is no violation of law. *See* App. at 18a-28a.

II.

THE TEXAS ATTORNEY GENERAL'S ATTEMPT TO USE THIS COURT'S "SUPERVISORY POWERS" TO ALTER TEXAS LAW IS A GRAVE ABUSE OF FEDERALISM.

Texas Attorney General Morales claims in his Cross-Petition that the Fifth Circuit Court of Appeals "contradicted this Court's expressed preference for settlements." Cross-Petition at 5. It did not. The Fifth Circuit recognized that this was no ordinary "settlement" but a bold grab for extraordinary power by a state official, and it refused to lend the enforcement powers of the federal judiciary to such abuse of power. Opinion at 9a-28a.

In his Cross-Petition, as below, the Texas Attorney General claims that he need not represent the officials who have been sued in this case. Cross-Petition at 9, 10. Instead, he claims sole absolute authority to speak for the State of Texas and to change a critical aspect of state government by "agreement" with private plaintiffs,

enforced through the federal judiciary, over the objections of his own clients, in the absence of any illegality in the laws he would change and in violation of many federal and state constitutional safeguards. This is an unprecedented claim to extraordinary power, not a mere exercise of ordinary settlement powers in litigation involving private interests, as the Court of Appeals recognized. Opinion, App. at 9a, 12a.

The Texas Attorney General condemns what he cails the Fifth Circuit's "adoption of a principle of compelled peristalsis of a bitterly fought, racially-charged case through the entire length of the federal judicial process." Cross-Petition at 7. He asks this Court for more "breathing room" and freedom from the "constrictions" of the Court of Appeals, as if this case were merely waste product being forced through the bowels of the federal court system. Cross-Petition at 6, 7. While the Texas Attorney General's scatological metaphor speaks eloquently to his ultimate opinion of this case and of the federal judicial process, it is deeply offensive to Judge Wood, as she assumes it is to this Court, not only for what it says about the Texas Attorney General's conception of this case but for what it says about his conception of the legal process itself.

The Court of Appeals is not merely "obstructionist," as this Attorney General insists. Cross-Petition at 6. The "settlement" or "consent decree" the Texas Attorney General and the Plaintiffs insist upon implementing through the injunctive power of the federal courts restructures the Texas judiciary and in so doing violates Texas' century-old and frequently ratified core policy of linking the jurisdiction and electoral base of its state district judges

to ensure their accountability to all of the persons subject to their primary jurisdiction and their independence from any faction. It violates a whole body of state constitutional and statutory protections, among them strong protections circumscribing the power of the Texas Attorney General to speak for the State and establishing and protecting the mechanisms for constituting and administering elections. Finally, it blatantly violates the principle of federalism enshrined in the United States Constitution – including protections guaranteed by the separation of powers doctrine, the Guaranty Clause, the Tenth Amendment, the equal protection and due process clauses of the Fourteenth Amendment, and the Fifteenth Amendment – by substituting law imposed by collusion between a political faction and a state official for laws duly enacted by the state legislature and consented to by the people. See *en banc* Opinion, App. at 28a, and *Wood v. Attorney General*.

Judge Wood is aware of no greater threat to the principle of constitutional representative government than this: that a State's attorney general – the State's own lawyer – should attempt to invoke the immense enforcement power of the federal judiciary to *reverse* a federal judgment in favor of the state and to impose his private political preferences by fiat on the people of the State – his clients – in place of duly enacted laws.

If this Court's supervision is called for, it is not, as the Texas Attorney General asserts, because the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision," Rule 10.1(a). It is because this state Attorney General has arrogated such power to himself as to raise a question of

federalism "which has not been, but should be, settled by this Court," Rule 10.1(c), namely, whether the Attorney General's activities in this case violate the separation of powers doctrine, the Guaranty Clause and the Tenth, Fourteenth, and Fifteenth Amendments. *See Wood v. Attorney General; see also en banc* Opinion, App. at 28a.

The Texas Attorney General's citation to authority for the proposition he advances is no less astounding than the proposition itself. The Attorney General cites *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 763 (1992) as authority for his claim that "[t]his Court has rejected propositions of law for the policy reason that doing so 'could serve as a disincentive to negotiation of settlements.' " Attorney General's Cross-Petition at 5. *Rufo* actually dealt with the question whether States can settle a dispute over the proper remedy for proven constitutional violations by undertaking to do more than the Constitution requires – a question which is unrelated to anything in these proceedings. *Rufo*, 112 S.Ct. at 762. However, in deciding that unrelated issue, this Court made an observation directly pertinent – and contrary – to the Attorney General's claim that he has the power to do anything he likes in the name of "settlement" and that the federal courts must enforce his will, like it or not. This Court held, "Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." *Id.*

Under the Texas Attorney General's theory, of course, there is no such thing as a State objection to any "settlement" he makes, since he *is* the State. However, under

ordinary principles of constitutional law and jurisprudence, the State's objections to the Attorney General's "consent decree" – which is aimed at restructuring critical aspects of state government to "cure" a violation in the absence of any adjudication that there is one – have been voiced by the Texas Legislature, which refused to enact his scheme into law; by the Chief Justice of the Texas Supreme Court, a named State Defendant, who objected to the "settlement" and hired his own counsel over the Attorney General's fierce opposition; by the Defendant-Intervenors, who objected as voters and as sitting district judges; by the Texas county and district judges from various counties who attempted to intervene as Defendants and whose interventions were rejected by the district court[2]; and by the silence of the people of Texas regarding a scheme of which they were kept ignorant.

To the extent *Rufo* speaks to this case, it says the opposite of what the Texas Attorney General would have the Court believe. *Rufo* says, in effect, that federal courts may not order states to replace their duly enacted laws with "laws" imposed by "consent decree" to which those who could object did object while those who should have been given the opportunity to object were not given that opportunity.

While no previous case in this Court has addressed as naked a claim of authority by a state official as this one, this Court has been very clear about the conditions under which state officials can enter "consent decrees"

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[2] *See, e.g., LULAC v. Midland County, Texas*, 884 F.2d 185 (5th Cir. 1990), and *en banc* Opinion, App. at 18a n. 11 (referencing the pending appeal of denial of the motion of Bexar County district judges to intervene).

over objections in ordinary cases affecting only private litigants. The Attorney General cites *Local Number 93, International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528-29 (1986) for the proposition that an intervenor "does not have the power to block [a consent] decree merely by withholding its consent." Attorney General's Cross-Petition at 8. But his quotation is taken out of context.

In *Local Number 93*, the dissenting party had been given full opportunity to object to the consent decree and his objections were *judicially heard and ruled on*. *Id.* at 529. This Court immediately went on to state,

> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. 3B Moore ¶ 24.16[6], p. 181; *see also, United States Steel Corp. v. EPA*, 614 F.2d 843, 85\45-846 (CA3 1979); *Wheeler v. American Home Products Corp.*, 563 F.2d 1233, 1237-1238 (CA5 1977). And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.

Id. The "settlement," which the Texas Attorney General worked out in secret with the Plaintiffs after excluding the Defendants from discussions, not only would deprive Judge Wood of her right to serve out her term in the

judicial system to which she was elected (as it would so deprive all state district judges); it would also deprive her of many State constitutional and statutory rights and protections as a state official, citizen and voter. *See* Opinion at 20a-21a. *Local Number 93* does not support the Texas Attorney General; it supports Judge Wood.

The Texas Attorney General fails entirely to cite *Firefighters v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576 (1984), in which this Court addressed the situation where settling defendants had obtained a favorable modification of a consent decree in a Title VII case over the objections of a non-settling defendant adversely affected by the modification and then attempted to walk away from the litigation. The Court stated, in a sentence particularly pertinent to these proceedings, "Respondents cannot invoke the jurisdiction of a federal court to obtain [a] favorable [ruling] and then insulate that ruling from appellate review by claiming they are no longer interested in the matter, particularly when the [ruling] continues to have adverse effects on other parties to the litigation." 467 U.S. at 572, 104 S. Ct. at 2584.

Nor does the Texas Attorney General cite *Martin v. Wilks*, 109 S.Ct. 2280 (1989), in which this Court held that a person's rights may not be adjudicated away by "consent decree" in a proceeding to which he has not been made a party – like the county and the district judges in Texas who attempted to intervene and were rebuffed and, even more egregiously, like the millions of Texas voters whose fundamental constitutional rights under the Guaranty Clause and the Tenth Amendment to determine the qualifications and structure of their own state government the Texas Attorney General – their own lawyer –

would spirit away by "consent decree." *Id.* at 2186; *see Gregory v. Ashcroft*, 111 S.Ct. 2395, 2402 (1990).[3]

The Texas Attorney General complains that the Fifth Circuit ignored *Kentucky v. Graham*, 473 U.S. 159 (1985), in which, he claims, "The Court directed that 'an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.' " He himself, of course, claims to be the only permissible spokesman for that entity. Attorney General's Cross-Petition at 9, 10. Putting aside the fact that *Kentucky* is a 42 U.S.C § 1988 attorneys' fee case and therefore inapplicable to this case (which perhaps explains why it was not cited by the Fifth Circuit), the Texas Attorney General's Cross-Petition evinces once again a critical error which the Fifth Circuit *did* address at length in its opinion – namely his claim to *be* the State of Texas, so that anything he says or anything he wants is what the State says or the State wants. The Fifth Circuit explained at length why this is a dangerous and insupportable concept on the part of the Attorney General. App. at 9a-17a. Yet what the Fifth Circuit called the Texas Attorney General's "bold claim of authority" resurfaces here in its full hubris.

Finally, the Texas Attorney General relies for support on *Wise v. Lipscomb*, 437 U.S. 535, 98 S.Ct. 2493 (1978), one of this Court's most important cases in *curtailing* the abuse of power by federal courts that would rush to

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[3] *Gregory*, which is central to the merits of this Voting Rights Act case as well as to the actions of this Attorney General, admonishes over-zealous partisans, like the Texas Attorney General, that "the Fourteenth Amendment does not override all principles of federalism." 111 S.Ct. at 2405.

implement remedies for *proven* constitutional violations without giving state legislatures the opportunity to do so. How the Attorney General can take comfort in *Wise* is elusive, since the reason for this Court's taking either the Attorney General's Cross-Petition in this case, if it decides to do so, or Judge Wood's Cross-Petition, seeking to realign and disqualify the Texas Attorney General for reasons he himself has made plain, can only be to extend the admonitions of *Wise* from overzealous federal judges, who will not let either state law or the United States Constitution stand in the way of their power to right a *proven* wrong, to overzealous members of a state executive branch who – scornful of the constitutional limitations on their powers and the legal and ethical restrictions on their office – would rush to right what they perceive to be a politically incorrect system.

Given the foregoing authority, which unambiguously rejects the claim of power which the Texas Attorney General asserts, and given the opinion of the Fifth Circuit, which thoroughly and eloquently rebuffed the Attorney General on all counts and in full accordance with controlling law except for its failure to realign and disqualify him, this Court should deny the Attorney General's Cross-Petition on its merits if it does not simply deny the issue he would raise as moot. Judge Wood asks, however, that if the Court grants the Attorney General's Cross-Petition or if it grants the Plaintiffs' Petition on the merits, it also grant her Cross-Petition seeking to realign the Texas Attorney General as a party and to disqualify him as attorney for the defense as a matter of law and equity and that it grant her the opportunity at oral argument to oppose the actions of the Attorney General and to defend the State of Texas on the merits. In a case of

Supreme Court magnitude, Texas is entitled to a lawyer – not a politician.

CONCLUSION

Respondent Judge Wood respectfully requests that the Court deny the Cross-Petition of the Texas Attorney General, *Attorney General of Texas v. Entz*, or, if it grants certiorari on the procedural issues raised, that it grant her Cross-Petition, *Wood v. Attorney General of Texas*, and realign the Texas Attorney General and disqualify him as counsel for the State of Texas. She further requests that the Court deny the Plaintiffs' Petition for Writ of Certiorari; or, alternatively, if it grants certiorari on the merits of this case, that it extend her intervention as necessary to permit her to defend the State of Texas at oral argument and that it affirm the *en banc* opinion of the Fifth Circuit Court of Appeals on the merits.

Respectfully submitted,

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8014

(Filed Jan. 11, 1990)

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, COUNCIL NO. 4434,

Plaintiffs-Appellees,

versus

WILLIAM P. CLEMENTS, ETC., ET AL.,

Defendants,

JIM MATTOX,

Defendant-Appellee,

versus

JUDGE F. HAROLD ENTZ, ETC., and JUDGE SHAROLYN WOOD, ETC. and GEORGE S. BAYOUD, JR., ETC.,

Defendants-Appellants.

and

TOM RICKHOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE and MICHAEL P. PEDAN, Bexar County, Texas State District Judges.

Appellants.

Appeals from the United States District Court for the Western District of Texas

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Before GEE, DAVIS and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellants' motion for stay pending appeal are GRANTED. We do so in order that the State of Texas may be allowed a reasonable opportunity to address the problem presented by the holding of the district court entered November 8, 1989, that the state system of selecting judges is invalid as violating Section 2 of the Voting Rights Act. *See* Chisom v. Roemer, 853 F.2d 1186 (5th Cir. 1988).

That holding, if sustained on appeal, will require an organic and wholesale review and reconstitution of the Texas judicial selection system, a task which should be addressed and carried out by the state's elected representatives, rather than by the federal courts. Only if it becomes apparent that the state is unwilling to act with measured and appropriate speed in this regard should our courts intervene. When the State has had a reasonable period within which to address the problem presented in a special session of the Legislature, the Court will entertain a motion to dissolve. That has not yet occurred; when it does, we will be amendable to a motion to dissolve the stay which we enter today. In the meantime, on our own motion, we EXPEDITE and consolidate the appeals from

the district court's orders of November 8, 1989, and January 2, 1990.[1]

It is further ORDERED that the motion for appellant Judge Sharolyn Wood, etc., for leave to consolidate this appeal with case number 89-6226 is DENIED. Instead, on its own motion the court consolidates this appeal with case number 90-9003.

It is further ORDERED that the motion of appellee Jim Mattox, etc., for leave to strike the notice of designation of independent counsel and the emergency application for stay filed on behalf of George S. Bayoud, Jr. is DENIED.

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[1] This appeal being founded on 28 U.S.C. §§ 1292(a)(1) and 1292(b), we need not concern ourselves about the motion pending before the trial court (denominated a "Rule 59(e)" motion in certain of the filings) to modify that court's interlocutory injunctive order. Rule 59(e) had no application to interlocutory orders, and the notice of appeal vests jurisdiction over this order in our court. *See* Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817 (5th Cir. 1989).